United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4249

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act made by

CARMELO BLUNDO,

Claimant-Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Self-Insured Employer-Petitioner,

—and—

DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION TO REVIEW A DECISION OF THE BENEFITS REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF LABOR

BRIEF FOR RESPONDENT, CARMELO BLUNDO

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BRIEF FOR RESPONDENT, CARMELO BLUNDO

Statement

The Respondent, Carmelo Blundo, hereinafter referred to as the claimant, agrees with the issue presented to this court for decision by Petitioner, hereinafter referred to as the employer, or I. T. O. The claimant however, does not agree with some of the facts as set forth by the employer.

Counterstatement of Facts

The claimant was injured on January 18, 1974 while in the course of employment for I. T. O., a self-insured employer. He was employed as a checker for this company for approximately five years at Pier 21st Street, Brooklyn, New York, which is adjacent to navigable waters of the United States. This pier is a large facility running from 19th Street to 21st Street and measures about 1,000 feet x 700 feet. The entire pier facility is enclosed and guarded (34a-37a) by McRoberts Protective Agency hired by I. T. O.

It is the sole business of I. T. O. to load and unload ships and to load and unload containers that are used in shipping. Said company can accommodate up to five ships at Pier 21st Street (38a). The employer receives cargo from ships to be delivered to consignees and strips containers (unloading) for the American Export Lines (39a, 40a, 69a). It has pier facilities located in New Jersey as well as the New York area (66a).

The claimant is assigned work as a checker either on the dock or on a ship or lighter (41a) by the dock boss. He does not know where he will be assigned to work until he reports and receives instructions from the dock boss each day (43a). During the course of the day his job assignment may be changed as required (44a) depending on the work that must be done by the employer.

The container or van that the claimant was assigned to check on the day of the accident had been unloaded a few days prior at another pier facility within the New York and New Jersey Port area, and then taken by a truckman to the 21st Street pier so that the seal placed on the container

in a foreign port, could be broken by the United States Customs (70a) then the container is stripped and placed in bonded warehouse under the supervision of United States Customs personnel (49a). After the container is stripped, the consignee's truckman picks it up after first being cleared by the United States Customs agents. The consignee must pay for all the duties due prior to receiving the cargo. The pick up is done within the pier facility maintained by I. T. O. at 21st Street (50a-52a).

The claimant was injured when he slipped on ice as he was "going around a draft" (52a). At the time of the accident, the claimant was approximately 30-40 feet from the water's edge (46a). The claimant was working on that portion of the pier directly over water (532-554a), known as the stringpiece.

When the sealed containers arrive from overseas, they must be stripped to effect delivery of individual consignees, because each container has cargo for multiple consignees. The consignee has a certain fixed time within which to pick up his cargo. If it is not picked up on time, there is a demurrage assessment made. Demurrage is a fine imposed on the consignee for using the pier facility for storage beyond the free time (112a-113a).

Jurisdictional Statutes Involved

The Longshoremen's and Harbor Workers' Compensation Act as amended November 26, 1972, hereinafter referred to as the Act (33 U.S.C. 901 *et seq.*) with particular reference to the following sections are the principal statutes involved:

902(3)

"(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

902(4)

"(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigible waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

903(a)

"SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer

in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—"

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"SEC. 920. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given. . . . "

921(b)(3)

"(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier."

ARGUMENT

POINT I

Under the law the presumptions are in favor of the claimant.

Section 920 of the Act states in effect that in any proceeding for the enforcement of a claim, that it shall be presumed in the absence of substantial evidence to the contrary that the claim falls within the provisions of the Act. To controvert this claim, the employer produced a Mr. Cash to testify. Mr. Cash's qualifications were that of a safety director to whom all accidents occurring to employees of I. T. O. must be reported. It did not appear from the record that this person had specialized knowledge of the operations of the employees working as longshoremen (including checkers) on docks and ships, other than his own particular job which involved the reporting of accidents and the documenting of same with the employer. By law, it is not enough to merely create a doubt. The employer cannot defeat the presumption under the law by raising doubts. It has long been established that doubts are to be resolved in favor of the employee. *Friend* v. *Britton,* 220 Fed. 2d 820 (D.C. Cir. 1955); *Beasley* v. *O'Hearne,* 250 Fed. Supp. 49 (S.D. W. Va. 1966).

POINT II

The construction of a statute by the agency charged with its enforcement is entitled to great weight.

Section 939 of the Act places the administration of the statute under the Secretary of Labor and gives him the authority to make such rules and regulations in order to effectuate the purposes of the Act. The purpose of creating a specific administrative agency to handle a specialized problem cannot be denied. In this particular case, the Benefits Review Board members were selected by the Secretary of Labor, 33 U.S.C. 921(b)(1), one from industry, one from labor and one neutral, it being the intention to create an expert panel with knowledge in the field. For this reason, the courts have consistently held that great weight should be afforded to the agency charged with the enforcement of a particular statute. *NLRB* v. *Boeing,* 412 U.S. 67 (1973); *Brennan* v. *Prince William Hospital,* 503 Fed. 2d 282 (4th Cir. 1974); *Nacirema Operating Company* v. *Oosting,* 456 Fed. 2d 956 (4th Cir. 1972). All of the latter cases held that while the interpretation of the administration agency is not controlling on the courts, it is nevertheless entitled to great weight.

The Benefits Review Board has rendered numerous decisions involving the loading and unloading of vessels and the loading and unloading of containers, which are used in carrying cargo aboard vessels. It has consistently held in all of these decisions that until such time as a terminal operator and/or stevedoring corporation delivers cargo to a consignee, it is performing acts which are part and parcel of the unloading process of a vessel, therefore its employees

injured in the course of performing this activity are engaged in maritime service. The Benefits Review Board has consistently rejected the point of rest theory advanced by the employers herein. The Board consistently held that the area wherein the employee is injured must be an area adjoining navigable waters of the United States, or an area customarily used in the loading and unloading of vessels and that the loading and unloading of ships is a continuous process accomplished by the employees working in various parts of the marine terminal in the handling of cargo and that the final act of unloading is not accomplished until the cargo is delivered to the consignee's truckman, who arrives within the terminal area for that purpose. A few of the leading cases decided by the Board on this point are as follows:

Dellaventura v. *Pittston Stevedoring Corp.*, 2 BRBS 340, October, 1975;

Battista v. *Atlantic Container Lines, Ltd.*, 2 BRBS 193, August 22, 1975;

Spataro v. *Pittston Stevedoring Corp.*, 2 BRBS 122, August, 1975;

Mininni v. *Pittston Stevedoring Corp.*, 1 BRBS 428, May, 1975;

Coppolino v. *I. T. O., Inc.*, 1 BRBS 205, December, 1974;

Avvento v. *Hellenic Lines, Ltd.*, 1 BRBS 174, November, 1974.

The Benefits Review Board continues to find jurisdiction arising under similar circumstances to be covered under the Act, notwithstanding the 4th Circuit Court of Appeals' decision in *I. T. O. Corporation of Baltimore* v. *Atkins*, —— F.2d ——, 4th Cir. No. 75-1051, decided 12/22/75, re-

lied upon by the petitioner herein. In a recent decision, *Cabrera* v. *Maher Terminals, Inc.*, 3 BRBS 297, the Board stated that it has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments of the Act, and will adhere to that interpretation notwithstanding the decision of the 4th Circuit in the *Atkins* case, *supra.*

POINT III

Section 921(b)(3) provides that the findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.

Under the old Act, Section 921(b) provided that review of compensation orders be made to the Federal District Courts. The scope of the review by the Federal District Courts was strictly limited. If the record contained evidence substantiating the findings of fact, as made in the decision under review, then the District Court would not disturb such a finding. *O'Keefe* v. *Smith, Hinchman and Grylls Assoc., Inc.*, 380 U.S. 359 (1965); *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Potenza* v. *United Terminals, Inc.*, —— F.2d —— (2 Cir. 1975). In effect, the Benefits Review Board has replaced the U. S. District Courts as an appeal tribunal for any party aggrieved by an order of an Administrative Law Judge. Although there has been some change in the appeal process under the new Act, nevertheless, case law as established prior to the amendment is still valid and the reviewing courts are similarly limited in the scope of their review. Questions of fact that have been decided by the Board are to be conclusive if substantiated by

the record, 33 U.S.C. 921(b)(3); *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U.S. 469 (1947); *Wheatley* v. *Adler, supra; Wolf* v. *Britton,* 329 Fed. 2d 181 (D.C. Cir. 1964). A review of the evidence contained in the transcript herein fully substantiates that the finding of fact that the claimant was injured in the course of maritime employment upon navigable waters of the United States is a valid finding made by the Administrative Law Judge, and reiterated by the Benefits Review Board, therefore it is conclusive and binding upon any appeals court.

POINT IV

I. T. O. is not in the warehousing business.

The employer constantly refers to the claimant as a warehouseman thereby infering that it is engaged in the warehousing and storage business, as well as in stevedoring operations. I. T. O. is not in the warehousing business in the New York or New Jersey area and never has been in said business. Its sole business operations are the loading and unloading of vessels and the loading and unloading of containers that are used in conjunction with today's modern methods of shipping cargo. There is no evidence in this record which indicates that a charge is made for storing of cargo in its warehouse to any person or company. To the contrary as stated above, a demurrage charge is levied on the consignee if he fails to pick up his cargo within the allotted free time. As stated by Mr. Cash, the employer's witness, the purpose of this charge is to discourage consignees from using the pier for storage purposes. To permit otherwise would create a massive amount of cargo to accumulate on the pier, thereby making it impossible to

receive other cargo for overseas shipment or to discharge vessels and deliver merchandise to consignees. There is required approximately one to two weeks time to strip cargo from containers temporarily placing it in a sheltered area, pending notification to the consignee that his merchandise has arrived and for the consignee to arrange for a trucker to pick it up. It is no different from a post office station that receives parcels for delivery to addressees within its zone of operations. The receipt of cargo by a terminal operation for delivery to a consignee does not make it a warehousing operation no more than the postal station can be considered a warehouse because it receives a parcel for delivery to various people.

POINT V

The amended Act specifically intended that checkers be covered within its new definitions.

The employer's brief correctly states that under the old Act (before the amendment effective November 26, 1972), that shore based activity was not covered under the compensation law. There followed a long line of controverted cases on the issue of interpretation of who was covered under the old Act until finally the Supreme Court in *Nacirema Operating* v. *Johnson,* 396 U.S. 212 (1969), recognizing the inequity of some longshoremen being covered under the more liberal federal law, while others doing essentially the same type of work on land were not, invited Congress that if it intended to have all longshoremen fall within the purview of the Act, that it should amend the law.

Congress accepted the suggestion made by the Supreme Court in the *Nacirema* decision *supra,* and amended the law effective November 26, 1972. In addition to expanding the area to be covered under the new Act, it also provided for substantially increased benefits to be paid (at present the federal law provides almost three times the monetary benefits of New York State compensation laws). It also provided the attorneys' fees to be charged to employers in controverted claims and eliminated the unseaworthiness doctrine as a cause of action in third party claims by longshoremen. It is because of the cost incurred by the increased benefits that employers are trying to limit the effectiveness of the new Act directly contravening the intent of Congress.

At page 10, House of Representatives Report #92-1441 the Committee on Education and Labor stated:

> "... The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. ..."

It is evident from a reading of the above that a checker such as the claimant herein was specifically mentioned to be covered under the new Act and that a uniform compensation system was to be applied to employees who sometimes

work on a ship and sometimes on the dock. The counter-statement of facts in this case show that the claimant does sometime work on ships and lighters, as well as on the dock. He may on occasion work stripping containers in the morning and on a lighter in the afternoon of the same day.

Nowhere in the old or new Act is there any mention of a "point of rest" theory advocated by I. T. O. A comprehensive research of numerous decisions rendered in connection with litigation in the compensation field fails to reveal any mention of petitioner's theory. The application of the Act is to be liberally construed in favor of the claimant to avoid harsh and incongruous results, *Reed* v. *SS Yaka,* 373 U.S. 410 (1964); *Michigan Mutual Liability Co.* v. *Arrien,* 34 F.2d 640 (1965).

The employer in its brief relies on the "Adkins, Harris and Brown" cases decided in the Fourth Circuit on December 2, 1975. This was a two to one decision on the issue of jurisdiction, with a strong dissent written by Judge Craven. It has been recently learned that re-argument *en banc,* has been granted and is scheduled for sometime in May, 1976. The employer also cites *Weyerhauser Co.* v. *Gilmore,* No. 74-3384 decided December 5, 1975 (9th Cir.), the facts of said case are entirely different than the case before this court. The claimant in the *Weyerhauser* case was not a longshoreman or checker. He was merely a "pondman" working in the sorting of logs afloat in a working area known as a pond. Logs from this pond were fed into a mill for processing into plywood. After the logs are processed, the finished product is loaded on a ship. The claimant in said case had no duties in connection with the dock work or loading and unloading of vessels. This court

is urged to reject the *Adkins* majority decision; reject the point of rest theory and adopt Judge Craven's opinion as the law.

POINT VI

The language of the new Act is clear, therefore there is no need to search beyond the language of the statute to establish its meaning.

It is only in those cases where the language of a statute is ambiguous and uncertain that the court may provide guide lines to its meaning and intent by resorting to legislative history to infer a narrow construction as urged by petitioner, *U. S.* v. *Hunter,* 459 F.2d 205 (4th Cir., 1972). If the language of the law itself is clear and, as in this case, where it is confirmed by the House of Representative Report *supra,* in that it specifically enumerates a checker as a person to whom the new Act would apply, there is certainly no need to research the point further, either by way of legislative history or by judicial interpretation.

POINT VII

The container being stripped was still in maritime shipment when the accident occurred.

The evidence adduced at the trial shows that the cargo had to be stripped in a bonded warehouse under the supervision of the United States Customs personnel. This procedure was required in order to insure that payment of all import duties due the United States Government were paid before an importer could cart it away from the pier (46a, 49a). The employer was specifically engaged in stripping a container for a shipping company, the American Export Lines (55a). All of the facts, circumstances of employment, and the parties connected with the transaction point to the maritime nature of the work being performed. The claimant is a longshoreman working under the subcategory of checker: he works for a company whose sole business is to load and unload ships and containers used in shipping. The work was done on a pier and directly over navigable waters of the United States (53a-55a). The United States Customs was directly involved in the stripping in that the cargo cannot be released to the importer unless all duties due were paid (46a). All documentation in connection with the cargo bore the name of the ship (48a).

In *Haggans* v. *Ellerman and Bucknall SS Co.*, 318 F.2d 563 (3 Cir. 1963), plaintiff was a member of a gang engaged in discharging cargo of sand bags from a ship. After the bags of sand were discharged from flat cars and stacked on the warehouse floor, the plaintiff slipped on sand which had spilled from the bags. The defendant claimed that the plaintiff was merely stacking bags for transshipment. It was

held as a matter of law that they were the same bags handled by longshoremen who had started the process of the discharge of the cargo. The pier apron could not contain the large number of bags, which in any event had to be protected from the weather by being placed in a warehouse. The court concluded that the plaintiff was performing an integral part of the unloading of a vessel.

In *Spann* v. *Lauretzen* (3d Cir. 1965), 338 F.2d 205. Spann, a longshoreman was standing on the dock operating a land based hopper. A land crane was unloading nitrate from a ship by placing buckets of nitrate from the ship into the hopper. The hopper would then discharge its contents into trucks. The hopper handle fell striking a longshoreman operating the hopper. The court held that the hopper was a temporary storage vessel to facilitate unloading, extending admiralty jurisdiction; it reasoned that the hopper was an essential instrumentality for unloading of the ship.

The *Haggans* and *Spann* cases, *supra,* therefore, establish that whether it is a warehouse (or other pier building), or a hopper, these facilities are only temporary holding areas to facilitate the unloading of ships. In the case before this court, the claimant was injured while assigned to checking a container. Although this container had been unloaded at another pier, it could not be stripped at said facility because it lacked a proper bonded warehouse where United States Customs men could supervise the delivery of cargo to consignees' truckmen (until all import duties were paid). The unloading process mandated by the modern method of shipping in containers, did not terminate until such time as the terminal operator, I. T. O., delivered the cargo to the consignee, as mentioned above.

POINT VIII

The finding of the Administrative Law Judge affirmed by the Benefits Review Board constitutes a binding finding upon an Appeals Court.

Prior to the new Act the law provided for the Deputy Commissioner to hold formal hearings and appeals from his findings and awards were made to the District Court. The new Act eliminated the District Court as an appeals court, substituted the Administrative Law Judge as the hearing officer instead of the Deputy Commissioner, and provided for an "internal" appeal within the framework of the United States Department of Labor to the Benefits Review Board, and thereafter, the Circuit Court wherein the site of accident occurred would consider any appeal by an aggrieved party. Notwithstanding the change in the Act, the law with reference to the upholding of findings of fact made by the Deputy Commissioner now the Administrative Law Judge, as well as the Benefits Review Board, must be upheld when supported by substantial evidence, *O'Leary* v. *Puget Sound Bridge & D.D. Co.,* 349 F.2d 571 (9th Cir. 1965).

The Administrative Law Judge held that the unloading process did not end where the container hit the pier. Cargo is in maritime commerce until it is unloaded from the container and further transshipment to the consignee's truckman after the container is stripped. There was a further specific finding by the Administrative Law Judge that the trucking from pier to pier where the claimant was injured, was not deemed further transshipment, but cargo being transported for unloading (13a) purposes.

On appeal to the Benefits Review Board by the employer, the Board also rejected I. T. O. theory that transfer of the container from one pier to another removed it from maritime commerce and it specifically found as a fact that cargo remains in maritime commerce until delivered to the consignee (23a).

Applying the law as mentioned in the *O'Leary* case *supra,* since this is a question of fact and there is ample substantial evidence in the record to support the finding, it cannot be disturbed on appeal to the Circuit Court even if the court would make a different finding of fact upon its own review of the evidence, *see* 33 U.S.C. 21(b)(3), *O'Keefe* v. *Smith Assoc.,* 380 U.S. 359.

POINT IX

Failure of employer to introduce evidence to negate the claim invokes the presumption under Section 920 of the Act.

33 U.S.C. 920 creates a presumption in favor of the claimant. The presumption is rebuttable, provided adequate evidence is introduced to support the employers' allegation that there is no jurisdiction, *Butler* v. *District Parking Mgt. Co.,* 363 F.2d 682 (D.C. Cir. 1966). When an employer offers sufficient evidence to rebut the presumption, only then is it possible to overcome the presumption, however, the evidence presented per se, does not control the ultimate decision, *John W. McGrath Corporation* v. *Hughes,* 264 F.2d 314 (2d Cir. 1959). The measure of proof required are facts not speculation. *Steele* v. *Adler,*

269 F. Supp. 376 (D.D.C. 1967). Where the presumption of compensability is overcome, only then does the fact finder (Administrative Law Judge) proceed to evaluate the evidence introduced by the parties. The statutory policy places a less stringent burden of proof on the claimant than on the employer, *Strachen Shipping Co.* v. *Shea,* 406 F.2d 521 (5th Cir., 1969).

The record indicates that there is no evidence introduced in behalf of the employer which can be considered in any form or manner to rebut the presumptions under the law. I. T. O. produced a Mr. Cash, the Safety Director for said employer (74a). This witness was not present at the time of the accident (75a, 76a). He was unable to identify the container the claimant was working on when injured (78a). There is no evidence that the witness in his capacity as Safety Director, had any specific knowledge of the employer's general method of operation in loading and unloading containers. He admitted that in another portion of the same enclosed facility, I. T. O. loads and unloads ships (81a). The employer cannot deny that it had the knowledge in its possession to identify the container the claimant was actually working on at the pier, reveal where it actually was unloaded as well as identify the cargo contained therein. It chose not to make such specific identification, therefore *ipso facto,* the presumption of jurisdiction under 33 U.S.C. 920 must prevail.

CONCLUSION

The decision of the Administrative Law Judge as affirmed by the Benefits Review Board should also be affirmed by this court.

The employer is charged under Section 28 with the attorney's fee for the respondent, Carmelo Blundo, in the amount as fixed by this court. A separate application for the fee request will be submitted to the court for its consideration.

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 29 day of April 1976 , at 9:30 o'clock A. M. he served the annexed Brief for Respondent in Re: #75-4249 Carmelo Blundo v. International Terminal Operating Co., Inc. and Director Office of Workers Compensation Programs, U.S. Dept of Labor upon William J. Kilberg

Esq(s)., Attorney(s)

for Respondent

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

Solicitor of Labor
Attorney for Director, Office of Workmens
Compensation Programs
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Washington, D.C. 20210

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 29th
day of April 1976

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 19